IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-262

FAYETTA GILBOUGH GANNON,
INDIVIDUALLY AND AS EXECUTRIX
AND TRUSTEE OF THE ESTATE OF
CLAIR H. GANNON, DECEASED,
Petitioner,

v.

MOBIL OIL COMPANY, A DIVISION
OF SOCONY OIL COMPANY, INC.,
A CORPORATION,
Respondent.

REPLY TO RESPONSE OF RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases.

STATUTES

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INACCURACIES IN THE RESPONSE

The response contains erroneous statements and inaccurate references to the record.

Mobil's statement at page 12 that ". . . seepage . . .

literally destroyed the surface of the land . . ." finds no support in the record.

Its witness Rhodes testified (R.289) that the wells were on ". . . a rocky dome with very little vegetation."

In comparison to the immense value of the wells destroyed and the oil left behind this bleak surface was and is worthless.

Mobil asserts that the wells were not destroyed and that ". . . several of the wells were used by subsequent operator Nelson Geyer." This is simply not true.

Thermo-Dyne's (Geyer's) operations under the 1972 lease were solely an unsuccessful attempt to replace the wells that Mobil had so senselessly destroyed and consisted of three efforts:

1. In accordance with its contract with Gannon (R.161), of which Mobil was fully aware prior to the plugging, Thermo-Dyne attempted to re-enter the No. 1-I well to deepen same to test the Arbuckle formation but failed in this effort because it could not drill out the iron and cement Mobil cemented into the hole (R.128, 129, 137). There can be no argument that Mobil did not destroy the 1-I well.

2. Next it spent $100,000 to drill a completely new well (R.144, 145). Unquestionably it would not have made such expenditure if it were economically feasible to re-enter the wells.

3. It re-entered the No. 3 well at a cost of $40,000 (R.137, 141) but gave up that effort.

Mobil squeezed hundreds of sacks of cement into the face of the oil sand (R.520) and Mobil's witness, Rhodes, testified that this sealed off the oil (R.288) making re-entry into the wells a futile effort.

Gannon's expert witnesses testified that the wells were destroyed (R.225, 227, 235, 236).

Geyer testified that a reasonable and prudent operator would prefer to spend $100,000 per well to drill new replacement wells rather than attempt to re-enter any of the other wells and failing as Thermo-Dyne did on the Nos. 1-I and 3 wells (R.142, 144).

A minimum of five wells is necessary for a secondary recovery operation (R.156) and Thermo-Dyne was never able to get in that position because Mobil destroyed the wells.

The lease to Thermo-Dyne expired on January 7, 1975 (R.51, 122) without producing or selling or paying royalty on even one (1) barrel of oil.

The property has been laid waste and stands barren with the wells destroyed and the oil sealed off.

THIS IS AN APPROPRIATE CASE FOR THE ISSUANCE OF A WRIT

Rule 19(b) provides for a writ when a court of appeals has decided an important state question in a way in conflict with applicable state law or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

In *Garner* v. *Louisiana* 368 U.S. 157, 163 convictions were reversed because they were "so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment."

This Court will concern itself with improperly directed jury verdicts. *Gibson* v. *Phillips Petroleum Co.* 352 U.S. 874; *Dick* v. *New York Life Ins. Co.* 359 U.S. 437.

In this case there is not any evidence to support the

three important fact findings upon which the judgment in favor of Mobil is based.

1. The date of termination of the October 14, 1959 lease from Gannon to Mobil - Pre-Trial Order - Issue of Fact No. 2-(R.386).

This was crucial because the duty to plug is placed upon the owner of the well — Rule 3-401(a) OCC-OGR and Definition 37 of Rule 1-101 OCC-OGR defines the owner as the party with the right to produce the oil.

Without a valid lease at the time of plugging Mobil was not the owner but was a trespasser destroying property of Gannon that it knew was to be used for both oil exploration and production.

The Court of Appeals first wrote (p. 3a Peti.) "Thus, the basis lease terminated, at the latest possible date, on December 24, 1970."

However it later wrote (p. 14a Peti.) ". . . the trial court found - with substantial support in the record - that Mobil's lease had not terminated when it commenced plugging operations . . ."

The statement is incorrect for two reasons:

First, "substantial support" is not the criterion for directing a jury verdict.

Second, there is absolutely *no evidence* in the record to continue the lease past the rental anniversary date of October 14, 1968.

Gannon proved that there were no rentals paid, operations or production that would continue the lease past October 14, 1968 which was more than three (3) years prior to the plugging.

The case is really simple for in Oklahoma there is no duty to plug a well that the owner does not intend to abandon. *Bryan* v. *State* 271 P 1020 (1928); *U.S.* v. *79.95 Acres of Land* 459 F.2d 185 (10th Cir. 1972).

Gannon, as the mineral owner, the owner of the steel production casing and the wellhead equipment in the wells and as the party with the right to produce the oil was the owner under every Oklahoma criterion and it was uncontraverted that Gannon did not intend to abandon the wells.

2. The Pre-Trial Order (R.386) reads in part as follows:

> *"Issues of Fact*
>
> 1. Whether the wells could be made to produce oil in paying quantities at the time of plugging *or subsequent thereto*." (emphasis supplied)

At the time of plugging in November, 1971 everyone in the industry knew that the price of oil was going to go up (R.147) and in fact it did reach a level of $12.32 a barrel by December, 1975 (S.R. 78).

Combining this oil price with the Mobil Engineering Report of November, 1966 (R.502) absolutely settles this lawsuit adverse to Mobil for this report *admitted*:

1. That technically the oil could be produced "in significant quantities" in the words of Mobil - up to 94 barrels a day from one well alone!

2. That the operating costs would *average* $2.11 or $2.56 a barrel over the life of the project which would last 10.4 to 14.2 years depending on the plan used.

The testimony of the Mobil witness Bentley of operating costs of $17.00 in 1966 is not any evidence on this issue because:

1. Under the Pre-Trial Order the period for operating costs to be examined was from December, 1971 up until the time of trial in June, 1976 and this testimony pertained only to an operation that was terminated in October, 1966.

2. It included the costs of the well explosions and with subsequent advances in technology (R.203, 204) this technical problem has been solved.

3. It was not an average cost figure over the life of a secondary recovery operation but only pertained to a "start up" period during which the costs are much higher than they would be over the life of the project for the *average* cost of same as admitted by Mobil would not be more than $2.56 per barrel.

There is *no evidence* in the record that *secondary recovery* operations from the time of plugging in December, 1971 forward introducing all evidence up to the time of trial in June, 1976 (23 Okla. Stat. Anno. 1971 §§5 and 61) would not have been profitable.

3. The other principal issue was whether or not any of the wells were *bona fide* prospect holes for the deeper horizons - Pre-Trial Order - Issues of Fact No. 3 (R.386).

Gannon's experts (R.218-221, 236, 237) proved without contradiction that three of the wells had value as prospect holes before the plugging but not afterwards.

There is *no evidence* in the record to the contrary!

PETITIONER'S REASONS FOR GRANTING THE WRIT ARE CORRECT AND ARE SUPPORTED BY THE RECORD

Pertaining to I petitioner would point out that this is an important energy case for it is common knowledge in the industry that Oklahoma produces approximately 500,000 barrels of oil per day and that this oil moves far beyond the boundaries of Oklahoma just as will the effect of this decision which requires the destruction of wells at the termination of primary

operations without considering evidence on secondary recovery.

Pertaining to II respondent writes "This is ample evidence that the wells could not be produced economically at the time of abandonment . . ."

First, "ample evidence" is not the standard for directing a jury verdict for there was substantial evidence from petitioner that the wells could be produced in paying quantities at the time of plugging.

Second, this emphasizes the refusal of the lower courts to consider whether or not the wells could be produced in paying quantities by *secondary recovery* methods which would require examination *subsequent* to the time of plugging, such refusal being a violation of clear and certain Oklahoma law.

Pertaining to III petitioner points out *further* gross departures ". . . from the accepted and usual course of judicial proceedings . . ." by the lower courts in that they utterly disregarded the Pre-Trial Order that was signed by the District Court and both parties in refusing to admit any evidence as to whether or not the wells could be produced in paying quantities *subsequent* to the time of plugging in contradiction of the rule that the issues are fixed by such order. *Hodgson* v. *Humphries* 454 F.2d 1279 (10th Cir. 1972); *Miller* v. *Brazel* 300 F.2d 283 (10th Cir. 1962).

The attack upon the veracity of the witness, Gannon, with statements that his testimony was "uncorroborated" emphasizes the disregard by respondent and both lower courts of the rules governing appellate review of a directed jury verdict.

His testimony was corroborated by the records of the telephone company (R.519) however the disregard of the testimony of this and other witnesses of petitioner is a clear violation of the rule requiring that

the appellate court accept the veracity of the witnesses of the party against whom the jury verdict was directed when it is reviewing same. *Wylie* v. *Ford Motor Company* 502 F.2d 1292 (10th Cir. 1974).

Lastly both lower courts completely ignored the Mobil Evaluation Report of November, 1966 which was admitted into evidence without objection. This was a complete admission against interest, when coupled with the price of oil, that the wells could have been produced in paying quantities at the time of plugging *or subsequent thereto,* Pre-Trial Order - Issue of Fact No. 1 (R.386).

CONCLUSION

The response contains many inaccuracies and actually emphasizes the disregard by the lower courts of Oklahoma law and the federal rules governing the direction of a jury verdict and the appellate review thereof to such an extent that there has been a *gross* denial of petitioner's rights to Due Process of Law under the Fourteenth Amendment.

Respectfully submitted,
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